

FINAL DECISION OF THE COUNTY COUNCIL/BOARD OF APPEALS

RE: Zoning Appeal Case No. 5071

APPLICANT: Old Trail Partnership

LOCATION: Foster Knoll Road, Parcel 142, Joppatowne

REQUEST: Variances to develop within the tidal and non-tidal wetlands, disturb habitat protection areas, and to locate a sewage pumping station within 75 feet of adjacent residential lots

WHEREAS, the County Council/Board of Appeals has reviewed the file and briefs in this matter; and

WHEREAS, the County Council/Board of Appeals has reviewed the entire record developed by the Hearing Examiner and has considered the recommended decision of the Hearing Examiner; and

WHEREAS, the County Council/Board of Appeals has heard all final arguments based on the evidence in the record.

NOW THEREFORE BE IT RESOLVED that the County Council/Board of Appeals, by affirmative vote of 5-2, rejects the Zoning Hearing Examiner's recommended decision, dated June 24, 2002, which proposed to approve all variances requested by the Applicant, based upon the findings of facts and conclusions of law as hereinafter set forth in this decision and the County Council/Board of Appeals modifies the Zoning Hearing Examiner's decision by denying in part some of Applicant's requested variances and approving in part with modifications some of the requested variances of Applicant as hereinafter set forth in this decision.

Case No. 5071 – Old Trail Partnership

BACKGROUND

The Applicant, Old Trails Partnership, has requested five separate variances to permit the development of a 56 lot single family home subdivision to be located on a 31 acre waterfront parcel situated in the Foster Branch area of Joppatowne near the end and west side of Foster Knoll Drive. This parcel consists of 30.978± acres and is identified on Tax Map 69 Grid B2, Parcel 142. This parcel is located entirely within the first election district. The majority of the parcel is zoned R3 with the remainder having a B3 zoning designation. The parcel is located within the Chesapeake Bay Critical Area (“CBCA”) with a portion located within the 100 foot wide critical area buffer.

Specifically, the Applicant has sought approval for variances from provisions of the following Sections of the Harford County Code:

1. A variance pursuant to Section 267-11 and 267-41.H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section 267-41.1(G)(4)(a), Critical Areas buffer, requesting a variance to allow development activities including structures, roads, parking areas, impervious surfaces and stormwater management facilities within the Critical Area buffer.
2. A variance pursuant to Section 267-11 and 267-41.1H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section 267-41.1(G)(3)(a), Habitat Protection Areas, to allow development or other land disturbance activities, within a Critical Area Habitat Protection Area.
3. A variance pursuant to Section 267-11 and 267-41.1H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section (G)(2)(a), and (G)(4)(b)(1) and (2) to allow a modification of the width of the Critical Area buffer, disturbance to the Critical Area Buffers, modification to the tidal and nontidal wetland buffer and allowance of development activities in nontidal wetlands.
4. A variance pursuant to Section 267-11 and 267-41.1H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section (G)(4)(e) Riparian Forests, to allow development within a Critical Area Riparian Interior Species Forest.
5. A variance pursuant to Section 267-11 of the Harford County Zoning Code from Section 267.36 B, Table VI, which requires a 200 foot setback for sewage pumping stations from an adjacent residential lot. The Applicant proposes a variance of one hundred twenty-five feet (125').

Case No. 5071 – Old Trail Partnership

The Applicant's request was advertised pursuant to the Zoning Board of Appeals rules of procedure in the Aegis Newspaper on February 14, 2001; February 21, 2001; October 31, 2001 and November 7, 2001. It was also advertised in the Record newspaper on February 16, 2001; February 23, 2001; November 2, 2001 and November 9, 2001. A hearing was held before the Zoning Hearing Examiner on July 16, 2001; November 19, 2001; November 26, 2001; December 3, 2001; December 12, 2001; February 6, 2002; February 13, 2002; March 6, 2002; April 29, 2002; and May 8, 2002. William F. Casey, Zoning Hearing Examiner, subsequently, on June 24, 2002 issued his decision. According to the Zoning Rules of Procedure, the Zoning Hearing Examiner's recommended decision automatically becomes that of the Board of Appeals unless a final hearing is requested. People's Counsel requested final argument on July 19, 2002 and the Chesapeake Bay Critical Area Commission requested final argument on July 23, 2002. The final argument was held on December 10, 2002 when attorneys for both Applicant, People's Counsel, and the Chesapeake Bay Critical Area Commission appeared before the Zoning Board of Appeals and presented their final argument concerning Old Trails Partnership's requested variances.

FACTS

Arthur E. Leonard, Principal of the State of the Art Civil Engineering, appeared and qualified as an expert civil engineer with specific knowledge of the Harford County Development Regulations. He prepared a Natural Features Analysis (See Pet. Ex. 6.), and described the subject property and surrounding features. He explained that he prepared this analysis by gathering information that other engineers had previously done on the proposed project as well as obtaining information from Harford County Division of Information Systems and Harford County Planning & Zoning Office. He further stated that he made only one visit to the site in question for approximately an hour and a half during the summer of 2001. He stated that the property has frontage on the Gunpowder River and contains 27.32 acres of R3 zoned land and 3.650 acres of B3 land. Access to the site is from Foster Knoll Drive where existing single family units are situated adjacent to the Property. Referring to the Natural Features Analysis, Leonard described the delineation of the 100-year floodplain, which encroaches onto a portion of the Property. (Pet. Ex. 6, page 3.) Leonard identified the delineation of the 1,000 ft. Critical Area. He explained the contour map of the Property, which indicated that the elevation ranged from zero, at sea level, to seventy feet. (Pet. Ex. 6, page 5.) He identified the slope map, which delineated in color the slopes on the subject parcel. (Pet. Ex.6.)

Leonard stated that based on the Chesapeake Bay Critical Area Criteria, slopes greater than 15% require the expansion of the Chesapeake Bay Critical Area Buffer and that the expanded buffer encompasses almost all of the Property with less than half an acre encumbered by the critical area buffer. Leonard acknowledged that some pieces of the parcel are subject to more topographical feature restrictions than other pieces of the land.

Case No. 5071 – Old Trail Partnership

Leonard described the Protected Habitat Area Map, which indicates that the majority of the site contains Forest Interior Dwelling Birds Habitat. (Pet. Ex., 6, page 8.) Leonard stated that the Chesapeake Bay Critical Area Program requires that the expanded buffer include Forest Interior Dwelling Bird Habitat. He reiterated that the graphic was based solely on information received from the Department of Planning and Zoning. Leonard described the Soils Map, which was based on the Harford County Soil Survey. (Pet. Ex. 6, page 9.) Leonard described the graphic titled "Approximate Limits of Wetlands". (Pet. Ex. 6, page 10.) He stated that the total site contains approximately 2.2 acres of non-tidal wetlands, of which four-tenths (.40) of an acre would be disturbed for development under the proposal.

Leonard reviewed the Petitioner's request for the variances for the proposed 56 lot single-family subdivision. He stated that the proposed homes would be compatible with the existing homes along Foster Knoll Drive. He stated that the plan did not seek to develop any of the B3 zoned property. He stated the Property could not be developed without a pumping station because the Property sits below the existing inverts of public sewer in the area and that the only way to remove sewerage from the proposed homes would be through a pumping station. Leonard testified that the code requirement for a 200 foot radius around the proposed pumping station from adjacent residential lots could not be achieved based upon the proposed plan which designed three or four lots within this buffer. Referencing Exhibit 9, he explained that the variance request is to reduce the required 200 foot setback to a 75 foot setback for a total of a 125 foot requested variance from the requirements of the Code. He further acknowledged that if you eliminated the proposed lots in question, there would be no need for this variance. He stated that, due to the topography, the area within which to site a pump station is severely limited.

He further explained that after he completed the mapping of the Natural Features, he undertook an additional analysis of the site. He prepared an overlay mapping to demonstrate how the Property is impacted by the expansion of the Critical Area buffer. (See Petitioner's Exhibit 7.) The overlay maps consist of the Property base map, 100-year floodplain, 100 foot Critical Area Buffer, Soils Maps, Steep Slopes and Forest Interior Dwelling Birds Habitat. By reviewing the series of overlays, he demonstrated that the overwhelming majority of the site is encumbered by the expanded Critical Area Buffer which basically renders most of the Property undevelopable unless variances are granted.

Leonard reviewed the proposed development plan and testified about the proposed location of

Case No. 5071 – Old Trail Partnership

the stormwater management facilities and stated that public water and sewer is available to the Property and the Property is in the approved Harford County Master Water and Sewer Plan.

Since the Property is designated I.D.A, it is required to meet a 10% pollutant reduction loading for stormwater discharge. Leonard testified that he believed that there was some erosion occurring from an existing drain that drains property to the east of the subject parcel. He further stated that there are some trails across the property that probably yield some erosive pollutants into the Bay. Leonard further testified that the Petitioner's plan to construct 56 units on the Property which equals the density of 1.8 dwelling units per acre. Leonard stated that the proposed development would be compatible with the adjacent neighborhood, since the density on the adjacent properties is 2.75 dwelling units per acre.

Leonard stated that he was familiar with the Department of Planning and Zoning's Staff Report dated July 10, 2001 and the Department of Planning and Zoning's Addendum to Staff Report dated November 14, 2001. Leonard was familiar that the Department of Planning & Zoning's Report stated that Petitioner provided insufficient information to the Department. Leonard testified that he did not receive any comments or inquiry from any staff member of the Department of Planning and Zoning concerning the information that Applicant's counsel submitted to them regarding the existing natural features on the Property. He further testified that he did not receive any inquiries or have discussions with any Staff members of the Department of Planning and Zoning or representatives of the Critical Area Commission concerning supplemental information which was submitted and discussed in the Addendum of November 14, 2001.

Leonard testified that he was aware of the negative conclusions of the Staff Report of the Department of Planning and Zoning but, however, he disagreed with same. In his opinion, Leonard believed that the literal enforcement of regulations would result in unwarranted hardship to the Applicant because when the Critical Area Regulations are applied to the Property, the Property is rendered undevelopable. Leonard further testified that literal interpretation of the zoning regulations would deprive the Applicant of rights commonly enjoyed by other properties in similar geographic and land management areas within the Critical Area nor did he believe that the approval of the variances would confer a special privilege upon the Applicant. Leonard believed that granting the variances requested would not be detrimental to the adjacent Property owners. Leonard further testified that at the time of his opinion, the proposed plan might need modification, but he believed that it was a minimum development strategy which was proposed but that information later would be provided after the Development Advisory Committee review process.

During cross-examination, Leonard acknowledged that he was not aware of the Department of

Case No. 5071 – Old Trail Partnership

Planning and Zoning's findings contained in the Staff Report of July 10, 2001 that the area in question was not a Forest Interior Dwelling Bird Habitat due to its fragmented nature. As a result, he further opined that this would unencumber an additional 1.8 acres which are adjacent to the half acre unencumbered area identified by him during his direct testimony. Leonard acknowledged that the I.D.A. designation does not constitute an exemption from the environmental protection.

Jacqueline Magness-Seneschal qualified as an expert in the field of Land Use Planning. For more than nine years, she served as Director of Planning for Charles County. Prior to that, she worked for a number of years for the Harford County Department of Planning and Zoning as Chief of Development Review. She currently works as a Planning Consultant. Seneschal testified that she prepared a written analysis of the history of the Old Trails Property which was introduced as Petitioner's Exhibit 11. The Board of Appeals is totally familiar with Petitioner's Exhibit 11 which contains the history of the property which she prepared.

Seneschal further testified that, in addition to being retained to prepare the history, she was also to analyze the variance request. Seneschal testified that, in her opinion, the Applicant established unwarranted hardship because they are unable to secure a reasonable return or make a reasonable use of their Property because virtually the entire site is within the extended buffer of the Chesapeake Bay Critical Area. She further stated that the hardship was peculiar to the Applicant's property and different from other properties in the same district. She noted that this Property as well as one other are the only undeveloped privately owned areas remaining within the Joppatowne waterfront planned community. She further testified that the Applicant partnership has attempted to secure approval for a variety of plans to use the property. She did, however, note that the property only had sewer service potential since approximately 1993. Moreover, she noted that it was the last undeveloped waterfront infill area remaining in the Joppatowne community.

Seneschal also stated that the unwarranted hardship and inability to develop this site for any significant use is created by the action of the County, the State and Federal Law, and most notably through the Chesapeake Bay Critical Area Regulations and not by any action of the Petitioner. Seneschal further addressed each of the provisions set forth in Harford County Code Section 267-41.I.H(1) (2) (3)(4) (5) (6) (7) and (8) wherein it states" . . . in granting the variance, the Board shall issue written findings demonstrating that the request and approval complies with each of the following

Case No. 5071 – Old Trail Partnership

condition:". Ms. Seneschal addressed conditions 1 through 8 and concluded that the Old Trails site is unique within the Chesapeake Bay Critical Area in Harford County. Ms. Seneschal testified that the owner can make no reasonable use of the Property under the strict application of the Critical Area Law.

Seneschal believed that the granting of the variances, subject to the conditions recommended by Robert Jones of Frederick Ward Associates, will comply with the conditions of 267-41.1.H. Seneschal stated that the proposed development is consistent with the Harford County Master Plan in that the 1996 Land Use Plan designates the Old Trail Property for medium intensity, where density ranges from 3.5 to 7 dwelling units per acre.

Seneschal testified that she reviewed the Department of Planning and Zoning's Staff Report and disagreed with its conclusion recommending denial of the Application. She noted that the Department of Planning and Zoning's Report implied that there may be areas that are not within the expanded buffer. Seneschal testified that Leonard's testimony and the Lee National decision shows that the entire site is within the expanded buffer. Seneschal further disagreed with the Department of Planning and Zoning and the Chesapeake Bay Critical Area Commissions position that the Property was subject to the criteria of Section 267-41.1 for the expansion of Intensely Developed and Limited Developed management areas, which have received growth allocations. Seneschal testified that Old Trails was initially designated as I.D.A. on the original maps approved by the Harford County Council. She further noted that the Property has never had an expansion of the I.D.A. Seneschal also testified that the Harford County Law Department in a June, 1988 letter, reached the same conclusion. She further opined that the decision from the Zoning Hearing Examiner in the Lee National case supported this conclusion. She noted that in the Lee National case the growth allocation criteria was not raised as an issue and therefore, was not considered. Seneschal, like Leonard, recommended that all variance requests be granted in their totality.

Robert Jones testified as an expert in the field of Environmental Science and Environmental Planning with familiarity with the Harford County Zoning Code and the Chesapeake Bay Critical Area Commission Rules and Regulations. He is employed by Frederick Ward Associates of Bel Air as an Environmental Project Manager. Jones stated he is familiar with the subject Property and walked the Property on one occasion.

Jones stated that he had prepared a document titled "Site Evaluation Old Trails Subdivision Joppatowne, Maryland" dated July 16, 2001. (Pet. Ex. 16.) He has previously testified before the Harford County Board of Zoning Appeals in reference to Critical Area variances. He testified in

Case No. 5071 – Old Trail Partnership

support of the variance requests for the Lee National property, and the Taylor's Point Subdivision, both of which are located in Joppatowne.

Jones identified the existing environmental features on the site, ranging from the topography to the forest cover. He described the hydric soils and highly erodible soils. Jones stated that the site has been logged in the past and the various stages of regrowth range from very thick undergrowth to fairly open canopy areas. He states that "adjacent development and disturbance have permitted an extensive amount of invasive and exotic species into the site." He testified that the existence of this type of vegetation is indicative of a lower quality forest condition. He testified that, in his correspondence with the Department of Natural Resources, he was advised that there are three species of rare plants in the area of the Property, the Parker's Pipewort, Spongy Lothotocarpus and Riverbank Quilwort. Jones stated that the location of all these plants would be situated off the Property and be in the tidal area in the Gunpowder River below the mean high tide.

He testified that on his site visit to the Property, he did not specifically look for these plants nor did he see them. He testified he walked the shoreline of the Property and described it as mostly a cobble, gravel shoreline with vegetative areas and areas exhibiting erosive conditions.

Jones further stated that he has analyzed the proposed variance requests. He stated that the Property cannot be developed without variances. He concurred with Leonard's testimony that the entire Property is encumbered by an expanded buffer. Under the proposed development plan, there would be approximately 18 acres cleared for the development and 13.8 acres would be designated open space, primarily along the shoreline.

The total impervious surface area proposed for this 56 lot subdivision would be approximately 5.9 acres, which is roughly 19% of the Property. He stated that the development project could meet the other criteria of the Critical Area Program, including the 10% Rule. The 10% Rule requires that if you develop within the I.D.A, you analyze the Property prior to the development to establish the base amount of pollutants that are generated from the site under existing conditions. Then you evaluate the proposed development to insure that, in the developed state, the pollutant loadings are at least ten percent (10%) less than in the undeveloped state. Jones stated that the Property, when developed, will exceed the requirements of the 10% Rule. He did testify that pollutant loadings from upslope developments running across the Property do not get factored in the 10% rule. Accordingly, although

Case No. 5071 – Old Trail Partnership

he testified concerning swails which originate from storm drain outfalls which discharge onto the Property which, in turn, created several gulleys conveying sediment directly into the Gunpowder River, these pollutants are not calculated into the 10% rule compliance.

Jones concurred with Leonard's testimony that none of the homes would be located within the 100-year floodplain, although portions of lots would be so situated. He indicated that he conducted a wetlands survey himself and utilized the National Wetlands Inventory Maps and a previous site plan for his wetlands assessment.

Jones further testified that the official maps in the Planning Department delineate the entire site with the designation of Forest Interior Dwelling Bird Habitat. By making reference to Exhibit 19, Habitats of Local Significance, he demonstrated that the entire site has been so mapped and has been defined as "Those areas that may contain rare, threatened, or endangered species and have been identified in the Harford County Environmental Elements Program."

Jones further stated that the variances should be granted subject to several specific conditions. He reviewed the text of his report under the heading Evaluation, and concluded that, in his opinion, the proposed development meets the goals of the Critical Area Program. If the requested variances were granted, the development could be constructed in compliance with the Harford County Chesapeake Bay Critical Area Program. Jones testified that the variances should be granted, subject to the specific conditions set forth in his report under "Recommendations".

Jones further testified concerning the Department of Planning and Zoning's Staff Report, where it was stated that the development of a single family residence or a few house may be possible. He stated he disagrees with the recommendation in the Staff Report and the conclusion that denial of the variances would not deprive the Petitioner of rights commonly enjoyed by other properties situated in similar geographic and land use management areas within the Critical Area.

Upon cross-examination, Jones testified that his impervious surface calculations were based on the footprint of the houses as identified by Leonard's plan. Jones acknowledged that he did not consider driveways, sidewalks, patios, and other impervious surfaces in his calculation. Jones calculated about 28 acres of the site are forested and that 16.5 acres would be cleared for the project. Jones acknowledged that the fact that the Applicant submitted different plans did not change the fact

Case No. 5071 – Old Trail Partnership

that the property is still subject to the Chesapeake Bay Critical Area Legislation. Jones stated that approximately 50 of the 56 proposed homes are located outside the wetlands and wetland buffers. He stated the stormwater management proposal for the Property is totally on site and will absorb some of the existing run off from upland adjacent properties. Jones stated he set forth recommendations in his report which would enhance stormwater quality and environmental management for the Property.

In rebuttal testified Howard Alderman, Esquire, for the Applicant. Mr. Alderman testified that he represented the Old Trails Partners during the time of the adoption of the Harford County Critical Area program. Mr. Alderman testified to a number of discussions he had with Council Members and Staff as well as correspondence located in his file between the Harford County Council and his office as well as the County Law Department. Based on his recollections and the various pieces of correspondence, Mr. Alderman concluded that the Old Trails property was initially designated I.D.A. and in his opinion, the limitations and restrictions of Section 267-41.1(M) do not apply to this property.

Anthony McClune, Chief of Current Planning for the Harford County Department of Planning and Zoning, outlined the position of the Department of Planning and Zoning by referring to the Department's Staff Report for Board of Appeals Case No. 5071 dated July 10, 2001 (Pet. Ex. 2), and by referring to the Department's Addendum to Staff Report dated November 14, 2001. (Pet. Ex. 5.) The Department recommends that all of the Petitioner's variance requests be denied.

McClune testified that the Property is within the Chesapeake Bay Critical Area and is designated I.D.A. In addition to the 100 foot buffer, the site contains hydric soils, steep slopes and highly erodible soils, which compel expansion of the buffer. Also, the site is designated a habitat of local significance, as it contains a globally rare plant species, a state rare plant species and a state watch list plant species. As a result of all of these variables, McClune testified, the buffer encumbers almost the entire Property.

McClune contended that the Applicant had not provided sufficient information of how this site would be protected, and then proceeded to review Section 267-41.1(H) concerning the criteria for variances to the Critical Area Program. He then addressed the Department's position on each of the eight conditions set forth under that Section as follows:

1. The Department concluded that the Applicant is attempting to intensely develop the site

Case No. 5071 – Old Trail Partnership

and that the site is not suitable for such an extreme proposal.

2. The Department found that the request does not minimize the adverse impact on water quality, fish, wildlife or plant habitat.
3. The Department found that the variance request is based solely on the Applicant's desire to develop the property in a manner inconsistent with the Critical Area Program.
4. The Department found that the amount of disturbance of the forested buffer on steep slopes is a major concern, along with the amount of impervious area proposed and that the request is not in harmony with the purpose and intent of the Critical Area Program.
5. The Department found the request, as submitted, would have a direct impact on the identified habitat protection areas on the site.
6. The Department concluded the granting of the variance would not exceed the growth allocation for the County.
7. The Department concluded that the variances, as requested, exceeded those necessary to allow a reasonable use of the property and that the Applicant had not attempted to reconfigure the development to allow for a more reasonable use.
8. The Department concluded the Applicant complied with the filing requirements for its variances.

McClune further concluded that after reviewing the additional information submitted to the Department, including the EA Engineering, Science and Technology Report, Frederick Ward and Associates Environment Assessment and all other information submitted by the Petitioner in July, 2001, that it did not change the Department's position. He concluded that the development of a single residence or a few houses might be possible on the site without an adverse impact. He further opined that the burden is on the Applicant to explain how to minimize adverse effects. It is not the responsibility of the County to demonstrate best management practices and mitigate or minimize the effects of development on the environment. The witness testified that the Applicant's proposal for development is too intensive a use for the property and is not consistent with the County's Critical Area program. The numbers of variances are unwarranted and would adversely impact the Code if granted. Mr. McClune testified that in his opinion there have been no attempts on the part of the property owners to reduce the impacts to the buffer.

McClune indicated that there is an area adjacent to the U.S. Government Electric Transmission right-of-way, where a limited number of homes, with specific conditions may be able to be placed, but even those lots would require variances. McClune indicated that he believed the Petitioner failed to

Case No. 5071 – Old Trail Partnership

request all necessary variances. He believed that the Petitioner's Property would also be subject to Section 267-41.1(M), which sets forth additional requirements for developing properties that have received growth allocations.

On cross-examination, McClune acknowledged that the Applicant reconfigured their proposed Plan from approximately 1984 to 1986 but, in essence, the Plan currently before the Zoning Board of Appeals is the one from 1986 which was initially submitted prior to the inception of the Critical Area Regulations. McClune further acknowledged that he told appraisers that between 10 and 14 lots may be possible to be situated on the property. McClune did identify an area with lots 3 and 4 and 22 through 29 on Exhibit 17 as those areas where development would have a less impact to environmental features. McClune acknowledged that there is an area which is basically less steep than some areas on the site.

McClune indicated that a specific Assistant County Attorney is assigned to the Department of Planning and Zoning to render legal opinions on land use and zoning issues. In the late 1980's, Jacqueline Moore, Esquire was the attorney responsible for advising the Department of Planning and Zoning. McClune is aware of a letter dated June 9, 1988 from Jacqueline Moore to Carroll, Director of the Harford County Department of Planning and Zoning. The letter stated that the Old Trails I.D.A. designation was part of the original program, not a request for an amendment based on a request for growth allocation and therefore, conditions of Section 267-41.1(M) do not apply. Notwithstanding this letter, McClune testified that the position of the Department of Planning and Zoning has changed as a result of its recent consultations with the Law Department.

McClune further confirmed Seneschal's testimony that the Petitioner had proposed a reconfiguration of the project, reducing the total lots requested to 51. Kocy responded to this submission on February 23, 2000, indicating that the Department's position remains unchanged from its statements contained in a June 20, 1994 letter in support of variances for only one lot.

Patricia Pudelkewicz, an employee of the Department of Planning and Zoning, appeared in opposition to the request. On January 28, 2002, she took several photographs depicting the Property and the properties that directly adjoin the site. Pudelkewicz testified that her photographs demonstrated the forest area in relation to the Property, as well as the steepness of the slopes. Additionally, she identified a ravine that runs across the Old Trails Property. Finally, she indicated that several photographs showed the problems with erosion, which some of the Foster Knoll Drive properties are experiencing.

Case No. 5071 – Old Trail Partnership

On cross-examination, she acknowledged that the ravine may have occurred as a result of the drainage outfall from an upstream development. Additionally, she indicated that she has seen some trash that has been dumped onto the Property. Finally, she could offer no explanation as to why some of the Foster Knoll property's backyards were eroding, while others were not.

Richard Impallaria lives at 232 Foster Knoll Drive, which was a pre-existing lot of record and is shown as Lot 17 on Petitioner's Exhibit 17. He bought the lot in 1996 with a contingency clause that if he could not obtain a building permit, the contract of sale would be null and void. He got his building permit, as it was an already existing lot with curb, gutter, water and sewer. The lot was already 90% clear, but Mr. Impallaria was told he could only remove up to two additional trees. If three trees were going to be removed, his request to build his home would have been denied. These rules for building the home were strongly impressed upon him, and he abided by them. He feels that 56 homes on the Old Trails property is far too intense and allows Applicant to build with an entirely relaxed set of rules. He also points out that most of the homes in the area have no more than two properties abutting their individual lots. With the project as proposed, Mr. Impallaria's neighbor would have five separate properties abutting it. When Mr. Impallaria was building his one home, he ran into several problems. In digging the foundation, usually you dig 3 to 4 feet out to keep walls from collapsing as you are working on the foundation. He had to go out 6 feet so the ground wouldn't collapse in while he was working. Digging to get to the water and sewer lines caused real problems, and a county inspector had to come out. The county inspector didn't want to come out, and Mr. Impallaria had to argue with him to get him to do so. By the time they had gotten deep enough to connect to the sewer line connection, the hole was 25-30 feet wide. The deeper he dug, the wider the hole got. "Pretty much for every scoop you took out, two scoops fell in." (Transcript, Volume VI, p. 131.) A problem also arose during the final grading of the front of his lot. He put down 4 inches of topsoil. It rained that night. All of the topsoil was gone the next day. In referring to pictures 12 and 13 taken by Ms. Pudelkewicz, he points out that there is backfill, which is soil not originally on-site and brought in from elsewhere.

He went on to point out some concrete slabs in Ms. Pudelkewicz's pictures. In the 1970's, the water line underneath the street burst and took out much of Foster Knoll Drive, including two building lots. Mr. Impallaria has lived in Joppatowne for over 30 years. He remembers talking to the man who installed the new gas line. The man told him that he couldn't believe they ever built houses there. The

Case No. 5071 – Old Trail Partnership

hole they had to dig had to be 25-30 feet deep and two to three lots wide. In Mr. Impallaria's opinion, this only goes to further show how fast the soils in this area can erode. He says putting in water and sewer lines will create ravines as there is no way a narrow hole can be dug for placement. And once trees are cut down, it will only make it harder. He says that a new bridge originally placed across Foster Knoll Creek was wiped out during the first storm that came. The bridge, he believes, was built in or around 1994. He testified that the Joppatowne plan originally called for Mariner Point Park to be developed as homes and a series of canals. But it was determined that it would not be an environmentally sound idea. This was so, even though the land at Mariner Point Park is much flatter, less wooded and at one time operated as a farm. As steep as the Old Trails property is, he has real concerns that the clearing of the trees and plants will result in nothing to hold the soil in behind his house. Significantly, Mr. Impallaria moved homes for a living for about eight years. This entails actually transferring a home from one site and moving it to another. The job required a heightened awareness of soil quality due to the fact that very intense weights were involved, and you had to be certain the foot-pegs of the crane were on solid ground or else the crane might topple over. Mr. Impallaria is a builder and was the general contractor for his home. Some panhandle lots would take up less space. He thinks some building around by the power lines, properly spaced, would make sense and could sell for a good deal of money. He points out that Parker's Point was pretty much cleared before they even began building homes.

Unlike Parker's Point, Old Trails is totally wooded and sloped. He points out that one house over in Parker's Point on a large well-spaced lot is selling for \$1,000,000.00.

Case No. 5071 – Old Trail Partnership

On cross-examination, he pointed out that some panhandle lots and a couple of estate homes, if built one at a time, would be something he would not have a problem with. He believes some larger well-placed homes would bring a generous return to Applicant. By developing the two areas of the property referenced in his testimony, Mr. Impallaria believes Applicant could make money off the property. He says that he is not anti-development; he just believes smart development of the land to preserve its resources is not maintained by the intensity of this particular project on this particular piece of land.

Tammy Baczynskyj lives at 239 Foster Knoll Road, which is the last house on the road. When purchasing the house nine years ago, they were looking for a quiet scenic area. The realtor advised them that the wetlands on the property behind their home would prevent development from occurring there. She checked with the Department, and they verified what the realtor told her. A couple of months after purchase, a tree from the Old Trails property fell on to their property. Mr. Freeman came over to their home. In the course of their discussions, he told the witness that he originally purchased the property to build one or two homes for himself and a partner to retire on. He went on to state, however, that he was unable to build because of wetland issues. The land is a habitat for wildlife -- deer, fox, thousands of birds, groundhogs, squirrels, etc. It is a natural area for deer to pass through from the Aberdeen area, and the trees are home to literally thousands of birds. Deforesting the property to the extent necessary for the project would impact the wildlife habitat. There is a gully by their home that carries so much water that, during a rainstorm, it sounds like a river. She and her husband have added trees, ivy, hosta and tons of soil to their property. Due to the slope of their backyard, they put a castle rock barrier up which is depicted in pictures she presented. In two weeks it fell and they had to rebuild it by using concrete footers. They have planted Leyland trees and Boston evergreens to hold the soil in place. They also live quite close to Edgewood Arsenal and Aberdeen. Trees provide a natural sound barrier from the testing that goes on there. Additionally, the testing causes windows and homes to shake. The trees also soften the noise from passing boats.

Tracey Harper has lived at 244 Foster Knoll Drive for eighteen years. She has a "constant battle" to have grass grow on the slope behind her house. The soil washes away. She has planted some trees but makes sure she fills in holes that crop around their bases. The pictures admitted do not show all the erosion that homeowners work with on their own properties. Representations were also made to her that there would be no significant development on the Old Trails property. She believes that if all 56 houses are built, it is impossible not to have a significant impact on the Bay and Foster Creek. Impacts can further occur by the actions of homeowners, such as in fertilizing their lawns.

Case No. 5071 – Old Trail Partnership

Nicholas Fiore lives at 500 Haverhill Road and is about one-half mile from the site. If he puts a shovel in the ground he hits sand in two inches. His backyard used to be 40 feet. The yard has eroded and sloughed off such that it is now 25 feet.

Karen Weaver has lived at 248 Foster Knoll Drive for 16 years. Her home is indicated at Lot 9 under the already existing lots on Petitioner's Exhibit 17. Her home backs up to the subject parcel. Ms. Weaver has concerns about the proposed development. Several healthy trees have fallen. She brought photos to the hearing of trees that fell last summer. The photos show that the trees are over 60 feet tall. They fell over in spite of the fact that there was no weather event or any act of nature that might have uprooted them. One day the trees were standing, the next day they were down. Although other trees have fallen, her testimony and photographs had to do with the three trees behind her house. Protestants' Exhibits 5-A, B, C and D indicate the fallen tree that was 60 feet tall. One picture contains the witness next to the uprooted tree. She is 6 feet tall, and the root ball was approximately 12 feet in diameter. Protestants' Exhibits 6 and 7 were other photographs taken by Ms. Weaver of two other healthy, mature trees that had fallen. These trees that fell were approximately 20-30 feet from her property line. Protestants' Exhibits 8 are pictures Ms. Weaver took from the first fallen tree looking up towards her home. There has been some erosion and Exhibits 8-A through 8-D provide perspective on same. Protestants' Exhibits 9-A through 9-C are photos that Ms. Weaver took that demonstrate deforestation. They show stumps of large trees obviously cut down. She believes that deforestation of the subject parcel is a legitimate concern if this development is approved.

Ms. Weaver went on to describe what she calls boggy ponds and boggy soil. She describes it as being like quicksand if you step in it. That soil stays wet a lot and there are several areas that stay wet all the time. She has taken a picture of what she calls "boggy soil" which was admitted into evidence as Protestants' Exhibit 10. She notes that it is well inland from where the actual stream and body of water is. Protestants' Exhibit 11 was a photograph that she took of a permanent pond. She noted that the pond is very small and went on to testify that there are several small pond areas present on the parcel at all times. Protestants' Exhibit 12 was a picture taken by Ms. Weaver behind her house. She thinks it is a good example of the drain path of any rainwater or runoff that comes from her property going towards the creek. There is a very steep drop-off from her lawn of approximately 10-12 feet. She thinks it may even be greater. Hardly anything will grow on that steep slope. And it is indicated right where the green is on Petitioner's Exhibit 12. She went on to note that the home she

Case No. 5071 – Old Trail Partnership

lives in is the most important and largest investment that she and her husband have ever made. She does not think it is fair to see her investment impaired by something she was told would never happen when she bought the house - i.e., extensive development on the subject parcel. She has also noted that there are cracks in the foundation of her house. Sometimes when they flush the toilet in the bathroom they have to do so twice instead of once. The drainage for the sewage is not good at the present time, and she thinks that placing an expensive development at a lower level will only create more problems. The fact that she has to flush twice is not a seasonal event and happens throughout the entire course of the year. She believes that the traffic generated by the project would have a negative effect. She notes that the most dangerous intersection in the area is at Joppa Farm Road and Foster Knoll. She has personally observed three separate accidents. She has also personally observed evidence of trees at or around that intersection having been hit. Finally, she is concerned about the schools. There is significant overcrowding at the present time based on her personal observations at Magnolia Middle School. She also noted that there is a lot of wildlife in the area that would be impacted by the development. Wildlife that she has seen includes raccoons, foxes, deer, groundhogs, moles and squirrels.

Mary E. Foutz has lived at 304 Foster Knoll Drive for over twenty years. She is a member of the Joppatowne Garden Club, and her property backs up to the Foster Branch Creek. She had concerns about the fragility of the soil. Her neighbor put in an in-ground preformed swimming pool and removed trees from the wooded slope. Within a year, dump trucks delivered rocks, which the neighbor had to hand-carry to the hillside to keep his land from falling away. The neighbor who owned the home and put in the pool moved. The subsequent neighbor had to put up a retaining wall to keep the hillside beyond the swimming pool in place.

When the neighbor cut down his trees, Ms. Foutz went along her wooded slope and decided to clean up branches and twigs around the trees on her land that resulted in bare forest floor being exposed. She has since put twigs and sticks back to help hold the soil. Correspondence between the Joppatowne Garden Club and Mary Dulaney James, admitted as Protestants' Exhibit 13, indicates that the State is interested in purchasing the Old Trails property under the Greenprint Program for conservation purposes.

Richard Baczynskyj has lived in his home, with his wife Tammy, for nine years. He has put about 25 trees on his property. He runs into rock and clay with very little soil that will hold. Photographs identified as Protestants' Exhibits 19 through 25 were admitted into evidence. These photographs

Case No. 5071 – Old Trail Partnership

show the nature of the soil and erosive conditions on and around his home. He has witnessed a tree fall down for no apparent reason and with no inclement weather conditions. Exposure of root systems is evident in his photographs. He feels that building 56 homes on the site would impede the view and enjoyment of people frequenting Mariner Point Park. He feels that 56 homes would result in about 112 additional cars at two cars per household. He has also seen three to four accidents at the Joppa Farm Road intersection. Additional vehicles will create more noise and air pollution. He feels schools are already overcrowded. He noted during the course of the hearing that he heard a lot said about the Chesapeake Bay buffer zone and the Critical Area. Approving the project loses sight of why these laws were created. They were created to protect the Bay. If these laws can be circumvented at will by the blanket variance requests being made by Applicant, he doesn't see why the laws were created in the first place. Further, he does not know where the deer, groundhogs, blue heron, bald eagle, fox, turtles and possums are supposed to retreat to.

The pumping station is an issue that concerns him because of odors that can emanate from it and because of noise. He wants to know what is going to happen to the waste or sludge if it backs up. He is worried about using backfill when digging for construction of homes and likens it to building homes on future sinkholes. As for hardship, he pointed out that the property is assessed for more now than what Mr. Freeman purchased it for.

Stephen Weaver, Karen Weaver's husband, testified he has worked in construction and, unlike Mr. Baczynskyj, had personal knowledge regarding the cracks in his home. It is his testimony that he has cracks in his foundation wall due to erosion as the land has shifted which, in turn, caused his footers to shift. He anticipates building a retaining wall at the bottom of his property. He also has concerns because of some of the bogs evidenced in pictures taken by his wife and admitted into evidence. He does not think it would be safe to build or place footers in such boggy areas.

Case No. 5071 – Old Trail Partnership

Elizabeth Monetti has lived at 318 Foster Knoll Drive for 35 years. There are a lot of accidents on the corner of Joppa Farm Road and Foster Knoll Drive. She had an accident there four years ago. Cars have ended up in people's front yards and parked cars have been sideswiped. She is concerned because the 100+ cars that will come with the implementation of this development will make a bad traffic situation worse. She also feels that this is a very special parcel of land. It is on the water and she has seen fox, deer and beaver. There are blue herons, owls and turtles. To her, it is this parcel of land acting as a buffer that has allowed for other development.

Sharon Youmans lives one-half to three-quarters of a mile away from the property. Her concerns were about traffic and mirrored prior testimony. She was also concerned about losing the woodlands. Scott Kropa lives at 255 Foster Knoll Road and voiced concerns similar to Ms. Youmans.

Kevin White wanted to share some photos he took of the subject parcel from Mariner Point Park. He wanted to demonstrate the natural beauty of the land, and Protestants' Exhibits 27 and 28 are the photos he took. He frequents Mariner Point Park four or five times a week.

The last citizen to testify was Francis Colville, who lives one-half mile from the site. His first major concern was with the increased traffic to be generated by this project. He has observed two severe accidents within the last year on Foster Knoll and Joppa Farm — both with ambulances. Traffic from Brittney Quarters resulted in the need to open or widen the road because of more traffic. He feels the same will happen here. He is also concerned over the loss of scenery and wildlife that the project will necessarily engender. Mr. Colville specifically referenced Tab 4 of the black binder prepared by Ms. Seneschal, which is a woodlands examination. The upper half of the slopes have loamy and clayey soil which is characterized by its poor stability. He testified that his concerns about the soils are set forth in Tab 4 of Petitioner's Exhibit 11.

Mr. Colville took the photos marked and admitted as Protestants' Exhibits 29-32. These pictures were offered to present an idea of the topography of the site including portions of a ridge on the property. There are also basins along the ridge where water can accumulate. He is concerned because, having sat in on most of the testimony, he has yet to understand how Applicant plans to disturb the soils without creating a bigger problem than already exists.

The State then presented testimony. Mr. Ron Serey, the Executive Director of the Critical Area

Case No. 5071 – Old Trail Partnership

Commission, testified on February 13, 2002 as a witness on behalf of the Critical Area Commission and in particular as an expert witness on the implementation of local Critical Area programs. He testified regarding the Commission, its staff and its responsibilities over the various local Critical Area programs. He explained how Harford County has its own Critical Area program based on the requirements of the state law. Mr. Serey also testified on the history of the Commission and the reason that the law was enacted at the state level in the 1980's and the general requirement for local jurisdictions to enact their own law after review and approval by the Commission.

Mr. Serey testified concerning the three separate land designations in the Critical Area, the growth allocation that is available to local jurisdictions and the manner in which a particular piece of property could receive a growth allocation. He went on to explain about Habitat Protection Areas and how those requirements apply to each land designation. Mr. Serey explained how the Commission arrived at the designation of IDA for the Old Trails property in 1988 when the County adopted its Critical Area program after intensive review and ultimate approval by the Commission. He further testified about a letter contained in Applicant's Exhibit 11, Tab 35 that stated that the Council approved the use of the County's growth allocation so that the Old Trails property could be designated IDA. He stated that the Commission would not approve the designation of IDA until the Council utilized its growth allocation, which it ultimately did. The witness also clarified the issue raised by Applicant concerning the application of Section 267-41.1(M) to the Old Trails property. In the opinion of Mr. Serey, that section of the Critical Area law applies to the Old Trails property. He testified that he agrees with the opinion of the Department and Mr. McClune on that issue. He further stated to the best of his knowledge the Commission was not a party to the legal opinion given to the Department in 1988, was not aware of the opinion and did not have a copy of it in its file.

Claudia Jones appeared next and indicated that she has been a science advisor with the Critical Area Commission since 1994. She began working for the Commission in 1990 as a natural resources planner. Prior to her employment with the Commission, she worked for the Fish and Wildlife Service as a wildlife biologist, and she worked for the Chesapeake Bay Foundation as a staff scientist. She was admitted as an expert in fish, wildlife, water quality and plant habitat in the Critical Area.

Part of her job includes overseeing local Critical Area programs. The Commission tries to be consistent in overseeing Critical Area programs throughout all the jurisdictions in the State. It is also

Case No. 5071 – Old Trail Partnership

her responsibility to provide recommendations on specific projects and to review significant variance applications within the Critical Area. She first had contact with this project a little over a year before she testified.

She went on a site visit with a local planner to assess impacts of the proposed project on the buffer, steep slopes and highly erodible soils. It struck her as quite unusual that the site plan she was asked to review was dated 1986. Usually when the Commission reviews site plans for variances in the Critical Area, such plans are more up to date, within a year or so. The site plan was devoid of information as to soils or wetlands, and no streams were shown. The absence of information incident to the site plan prompted her to contact Harford County to see if they had more information from the Applicant. She was advised that they did not.

At one point, Jackie Seneschal set up a meeting with the Commission, which took place within the last year. Ms. Seneschal was advised that the Commission would need to know the extent of the buffer, an analysis of the slopes, a field analysis of wetlands locations, the presence of any streams on the property, etc. It was hard for the Commission to provide any specific feedback without such information. Ms. Seneschal was also advised that the Commission needed a letter from the Department of Natural Resources as to threatened or endangered species on or around the site. Ms. Jones testified that she never received such information from Ms. Seneschal or anyone else. Therefore, she reviewed the application considering the site plan as provided, the State's criteria for the Critical Area, the State law, State and County Critical Area Maps and the Harford County Critical Area program.

Ms. Jones became aware that the County considered the site a habitat of local significance (HLS). As such, the County protects the resources on this site as a heightened priority. Rare plants adjacent to the site, steep slopes and highly erodible soils contribute to the designation. Because the site is an HLS, Applicant is required to consult with the Maryland Department of Natural Resources Heritage Program in order to insure protection of rare species. The site plan given to Ms. Jones for review did not designate the site as an HLS. The Applicant should have disclosed this because such a designation is important in reviewing the requested variances. She testified that this type of omission by the Applicant was unusual. Not every jurisdiction recognizes HLS designations, and counties that do want to take extra effort to protect such areas. There has been no request to the Department of

Case No. 5071 – Old Trail Partnership

Natural Resources regarding the proposed development's impact to threatened or endangered species on this site for at least the past two years.

She went on to testify that the 100-foot buffer is the minimum distance put in place to safeguard aquatic resources. This buffer is expanded to protect aquatic resources when there are steep slopes, highly erodible soils and hydric soils. The vegetative buffer on this site performs several functions. First, it protects water quality: (a) by trapping sediments; and (b) by taking up nutrients and runoff from rainwater and upland development. Second, it provides good wildlife habitat. Some of the best wildlife habitat is found within riparian areas and buffers. Vegetative buffers also provide transition areas between aquatic resources and landward human activities.

The problem with steep slopes is that water runs off faster and more surface area is needed for the water to slow down and infiltrate into the soil. Highly erodible soils result from steep slopes and from the very nature of the soil itself. Highly erodible soils don't bind to each other very well. She would expect the proposed project to cause erosion and smothering of aquatic resources, including loss or minimization of submerged aquatic vegetation. Vegetation necessary to hold the soils in place would be removed, and she believes sediment and erosion controls are not effective, even in the best of circumstances. She points out that this parcel, with its Habitat Protection Areas and expanded buffer, "is far from the best of circumstances." A study presented in the Watershed Protection Techniques Journal found that most sediment and erosion control practices only achieve 50-85% efficiency for total suspended solids.

Although Applicant talks generally about sediment control techniques, Ms. Jones testified that there are no specifics as to where they would be placed, nor have they been tied to the need to protect sensitive resources such as the inter-tidal plant species. She stated that, generally, the Commission would see "very specific information on a project of this magnitude with these sensitive resources, particularly with such highly erodible soils and steep slopes, as well as listed plant species." (Transcript, Volume IX, p. 26.) It is extremely difficult to protect especially sensitive resources when there are no specifics such as the exact nature of how sediment and erosion controls would be conducted.

Another concern she has is that the extensiveness of this development will require major cutting into and moving around of the existing soils. The soils on the site are unstable, even without any manmade disturbances being generated. Although sedimentation and erosion are natural, plants can adapt if these processes occur slowly enough. Construction on the site can affect downhill resources

Case No. 5071 – Old Trail Partnership

by covering up plants and by changing the substrate in which they grow. If the substrate is changed, the plants may not recover or grow. Resulting cloudiness or turbidity of the water will negatively impact submerged aquatic vegetation. This, in turn, can affect the aquatic animals depending on such vegetation. This is currently a significant concern with the Chesapeake Bay.

Although specific information her office generally sees with variance applications was not supplied to her in this particular case, she is of the opinion that development on steep slopes and highly erodible soils should be minimized and the buffer should be maintained at a minimum 300-foot width. Additional sediment and erosion controls need to be developed and specified. Phasing of development should insure only minimal areas of the site are disturbed at a time and that the disturbed area is revegetated and stabilized before moving on to disturbing the next minimal-sized area.

There have been three rare plant species which have previously been identified in the water adjacent to the site. During her visits to the site she did not observe those plants which would be located in the water. She is of the opinion that it would be extremely difficult to implement the proposed project without significant impact or alteration of the threatened and rare species habitat. Parkers Pipewort is globally rare and listed as threatened in Maryland. Spongy Lothocarpus is state rare, and the Riverbank Quilwort is designated as a Watch List plant. These plants exist in the inter-tidal zone adjacent to the site.

State's Exhibit 2 (4/29/02) was a Memorandum from David Brinker of the Department of Natural Resources. The County designated the Gunpowder Shore protection area as a HLS in 1995. Construction on steep slopes should be prohibited. The Habitat Protection Area covers the whole site.

In her review, Ms. Jones consulted the Harford County Soil Survey. Hydric soils are important to maintaining wetlands and are an intrinsic part of such habitats. The loamy and clayey soils on the site are particularly characterized by their poor stability. Stability worsens when such soils are disturbed by land leveling or filling. Such LYD soils are best suited to woodland and wildlife habitat. Cut slopes with this soil are unstable and establishing vegetation on such cut soils is difficult. The excerpt from the soils survey, admitted as State's Exhibit 3 (4/29/02), states that "although soil maps and tables serve as a guide and can eliminate a site from further consideration, they do not eliminate the need for direct, detailed, on site investigation." Ms. Jones pointed out that such a detailed on-site investigation has yet to be performed on the site.

Case No. 5071 – Old Trail Partnership

The loamy and clayey soils cover a large portion of the site. They are severely limited for streets and parking. The limitations are severe with subsoil shrinkage and instability. It even has severe limitation for home gardens. Such limitations are difficult and costly to overcome.

She observed that the Exhibits prepared by Arthur Leonard concerning the various natural features and significant site constraints were based on G.I.S. information. Ms. Jones further opined that, in her experience, G.I.S. gives a very good indication of what exists on a site or in an area but it doesn't tell you specifically what is on a site. In this case, for example, she noted that the soil survey did not indicate that there is a stream at all on the site. However, when she went into the field there is definitely one stream and possibly two. She further testified that she personally walked the subject property three times. She further stated that she went to the site and made the evaluation of the presence of forest interior dwelling bird habitat and determined that the site did not qualify as a forest interior dwelling bird habitat. Ms. Jones further testified that she confirmed this determination with regional ecologists.

It is Ms. Jones' professional opinion that the requested variances to build 56 homes should be denied.

CONCLUSION:

The Applicant is seeking the following relief from the provisions of the Harford County Code:

1. A variance pursuant to Section 267-11 and 267-41.H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section 267-41.1(G)(4)(a), Critical Areas buffer, requesting a variance to allow development activities including structures, roads, parking areas, impervious surfaces and stormwater management facilities within the Critical Area buffer.
2. A variance pursuant to Section 267-11 and 267-41.1H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section 267-41.1(G)(3)(a), Habitat Protection Areas to allow development or other land disturbance activities, within a Critical Area Habitat Protection Area.
3. A variance pursuant to Section 267-11 and 267-41.1H(I), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section (G)(2)(a), and (G)(4)(b)(1) and (2), to allow a

Case No. 5071 – Old Trail Partnership

modification of the width of the Critical Area buffer, disturbance to the Critical Area Buffer, modification to the tidal and nontidal wetland buffer and allowance of development activities in nontidal wetlands.

4. A variance pursuant to Section 267-11 and 267-41.1H(1), (2), (3), (4), (5) and (6) of the Harford County Zoning Code from Section (G)(4)(e) Riparian Forests, to allow development within a Critical Area Riparian Interior Species Forest.
5. A variance pursuant to Section 267(11) of the Harford County Zoning Code from Section 267-36 B, Table VI, which requires a 200 foot setback for sewage pumping stations from an adjacent residential lot. The Applicant proposes a variance of one hundred twenty-five feet (125').

APPLICABLE LAW

Section 267-41.1F

F. Regulation of uses in the Critical Area Overlay District.

- (1) Existing zoning. Unless otherwise specified in this section, the rights and limitations pertaining to the use of the land as specified in this Zoning Code shall remain in effect, subject to compliance with any additional requirements of this section.
- (2) This section supplements existing county zoning and other regulations governing development in the critical area and is superimposed upon all existing zones and land use activity specified in this section. All development or redevelopment activity must conform to the existing zoning regulations, to the development regulations specified in the subdivision regulations and to the special conditions and regulations set forth in this section. In the event of conflicts between existing zoning regulations, subdivision regulations and other overlay district regulations and this section, the more restrictive section shall apply.

Case No. 5071 – Old Trail Partnership

Section 267-41.1H

- H. Variances. Variances from the provisions of this section may only be granted if, due to special features of a site or other circumstances, implementation of this section or a literal enforcement of its provisions would result in unwarranted hardship to an applicant. All applications for variances shall be reviewed by the Zoning Administrator for conformance with applicable provisions of this section, and a written report shall be provided to the Board of Appeals. In granting a variance, the Board shall issue written findings demonstrating that the requested approval complies with each of the following conditions:
- (1) That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.
 - (2) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.
 - (3) That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.
 - (4) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.
 - (5) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.
 - (6) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.
 - (7) That the growth allocation for the county will not be exceeded by the granting of the variance.
 - (8) That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.
 - (9) All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.

Case No. 5071 – Old Trail Partnership

Section 267-41.G(2)(a)

G. Habitat protection areas.

- (1) The purpose of this subsection is to ensure protection for the following types of areas with significant resource value, called "habitat protection areas," no matter where they are located within the critical area.
- (2) The following areas of significant natural value are classified "habitat protection areas" and are so designated on each Zoning Map Overlay or herein defined:
 - (a) Critical area buffer. An area a minimum 100 feet in width as measured from the mean high water line of tidal waters, tidal wetlands and tributary streams shall be established and maintained in a natural condition. The critical area buffer is expanded beyond 100 feet to include the following contiguous sensitive areas:
 - [1] Hydric soils, highly erodible soils, wetlands or other aquatic habitats, and steep slopes.
 - [2] Steep slopes are defined as slopes which equal or exceed 15% slope. Steep slopes shall be measured by transects spaced a minimum of 35 feet apart along the base of the slope. Transects measuring steep slopes shall be run perpendicular to the slope beginning at the base of the slope and shall measure slopes with a minimum of 35' run increments up the slope to the top of the slope or the boundary of the critical area, whichever is less. In the case of steep slopes within or contiguous to the critical area buffer, the buffer is additionally expanded beyond the expansions for the above-listed sensitive areas 4 feet for every 1% of slope as averaged over the contiguous steeply sloped area or to the top of the contiguous steeply sloped area, whichever is greater.

Section 267-41.1G(4)(a)

G. Habitat protection areas.

- (4) Specific provisions. Activities affecting particular habitat protection areas shall comply with the following requirements:
 - (a) Critical Area Buffer.
 - [1] The Buffer shall be maintained in natural vegetation and may include planted native vegetation where necessary to protect, stabilize or enhance the shoreline. In the case of new development where the Buffer is not entirely established in woody vegetation, the Buffer shall be planted according to the standards set forth in the Forest Management Guide for buffer plantings.
 - [2] New development activities, including redevelopment

Case No. 5071 – Old Trail Partnership

activities and including structures, under-ground petroleum product storage tanks, roads, parking areas and other impervious surfaces, mining and related facilities or septic systems (and other disposal systems), may not be permitted in the Buffer, except for those necessarily associated with water-dependent facilities as approved in accordance with Subsection F(6) of this section. Replacement of existing under-ground petroleum product storage tanks shall be with aboveground tanks.

- [3] Where agricultural use of lands within the area of the Critical Area Buffer ceases and the lands are proposed to be converted to other uses, the Critical Area Buffer shall be established. Establishment of the Buffer shall include the establishment of appropriate forest vegetation as specified in the Forest Management Guide. Appropriate surety and covenant shall also be required as specified in Subsection F(3)(b)[5][d] of this section.
- [4] For any commercial timber harvesting of trees by selection or for any cutting or clearing of land within the Critical Area Buffer, a Buffer management plan shall be prepared by a registered forester and approved by the Maryland Forest Service based upon recommendations of the Harford County Forestry Board and the Harford County Department of Planning and Zoning. Cutting or clearing operations specified in such plans shall be conducted in accordance with the following requirements:
 - [a] Selective cutting may be permitted to within fifty (50) feet of the mean high water line of tidal waters, perennial tributary streams and tidal wetlands.
 - [b] Non-tidal wetlands and other identified habitat protection areas shall not be disturbed.
 - [c] Disturbance to stream banks and shorelines shall be avoided.
 - [d] The area disturbed or cut shall be replanted or allowed to regenerate in a manner that assures the availability of cover and breeding sites for wildlife and reestablishes the wildlife corridor function of the Buffer.
 - [e] The cutting shall not create logging roads and skid

Case No. 5071 – Old Trail Partnership

trails within the Buffer.

- [5] Except as specified below, any clearing of vegetation or removal of trees within the buffer is prohibited unless a buffer management plan is submitted and approved by the Department of Planning and Zoning prior to any clearing or removal.
- [6] The cutting of trees or removal of natural vegetation may be permitted in the critical area buffer where necessary to provide access to private piers or to install or construct a shore erosion protection device or measure or a water-dependent facility, provided that the device, measure or facility has received all necessary state and federal permits and provided that a buffer management plan has been approved by the Department of Planning and Zoning.
- [7] Individual trees may be cut for personal use, provided that this cutting does not impair the water quality or existing habitat value or other functions of the buffer, and provided that the trees are replaced on an equal basis for each tree cut, as approved by the Department of Planning and Zoning. Planting specifications for replaced trees are given in Appendix F of the Harford County Chesapeake Bay Critical Area Management Program, as amended.
- [8] Individual trees may be removed which are in danger of falling and causing damage to dwellings or other structures or which are in danger of falling and therefore causing the blockage of streams or resulting in accelerated shore erosion. Individual trees removed must be replaced on an equal basis for each tree cut, as approved by the Department of Planning and Zoning.
- [9] Under the guidance of the Department of Natural Resources, horticultural practices may be used in the buffer to maintain the health of individual trees. However, the clearing of understory may only be undertaken with a buffer management plan approved by the Department of Planning and Zoning.
- [10] Other cutting techniques may be undertaken within the buffer under the advice and guidance of the Departments of Agriculture and Natural Resources, if necessary to preserve the forest from extensive pest or disease infestation or threat from fire.

Case No. 5071 – Old Trail Partnership

[11] Buffer exempt areas. The following provisions apply to shoreline areas that have been identified as buffer exempt areas in the Harford County Critical Area Program as shown on the buffer exempt area maps attached hereto and incorporated hereby by reference. Buffer exempt areas are those lots of record as of December 1, 1985 where the pattern of residential, industrial, commercial or recreational development prevents the buffer from fulfilling its intended purposes as stated in COMAR 27.01.09.01.B. For purposes of this buffer exempt area section, development refers to sites with less than 15% existing impervious surface and redevelopment pertains to sites with greater than 15% existing impervious surface.

[a] For single-family, detached residential areas designated as buffer exempt areas, construction or placement of new or accessory structures, minor additions and associated new impervious surfaces on developed lots or parcels is permitted provided that:

- (i) The applicant can demonstrate that there is no feasible alternative for the location of the new development or redevelopment activities, including structures, roads, parking areas and other impervious surfaces or septic systems.
- (ii) New development or redevelopment shall minimize the shoreward extent of intrusion into the buffer. New development and redevelopment shall not be located closer to the water (or the edge of tidal wetlands) than principal structures on adjacent properties or the local setback for the zoning district, whichever is greater. In no case shall new development or redevelopment be located less than 25 feet from the water (or the edge of tidal wetlands).
- (iii) Existing principal or accessory structures in the buffer may be replaced in the same location. Any increase in impervious area within the buffer shall comply fully with the requirements of this section.
- (iv) New accessory structures may be permitted in the buffer in accordance with the following setback requirements:

Case No. 5071 – Old Trail Partnership

- a. New accessory structures may be located closer to the water or edge of tidal wetlands than the dwelling only if there are no other locations for the accessory structures;
 - b. The area of the accessory structures within the buffer shall be minimized and the cumulative total area of all new and existing accessory structures within the buffer shall not exceed 500 square feet within 50 feet of the water and 1,000 square feet total; and
 - c. In no case shall new accessory structures be located less than 25 feet from the water or edge of tidal wetlands.
- (v) Variances to other setback requirements have been considered before additional development within 100 feet of mean high tide is approved.
 - (vi) No natural vegetation may be removed in the buffer except that required by the proposed construction. The applicant will be required to maintain any other existing natural vegetation in the buffer. Any clearing of trees or other removal of vegetation shall be completed consistent with § 267-41.1G(4) above.
 - (vii) Development does not impact any other habitat protection areas other than the buffer, including nontidal wetlands, other state and federal permits notwithstanding.
 - (viii) Buffer exempt area designations shall not be used to facilitate the filling of tidal wetlands that are contiguous to the buffer to create additional buildable land for new development or redevelopment.
 - (ix) Any development in the buffer exempt area requires mitigation in the form of plantings, offsets or fees in lieu.

Case No. 5071 – Old Trail Partnership

- a. Natural vegetation of an area twice the extent of the footprint of the development activity within the 100-foot buffer shall be planted on-site in the buffer or other location as may be determined by the Zoning Administrator. If it is not possible to carry out offsets or other mitigation within the critical area, any planting or other habitat/water quality improvements should occur within the affected watershed
- b. Applicants who cannot comply with the planting requirements may use offsets to meet the mitigation requirement. Offsets may include the removal of an equivalent area of existing impervious surfaces in the buffer, the construction of best management practices for stormwater, wetland creation or restoration or other measures approved by the Zoning Administrator that improve water quality or habitat.
- c. Applicants who cannot comply with either the planting or offset requirements above on-site or off-site within the critical area shall pay a fee in lieu of \$1.20 per square foot for the area to be planted.
- d. Any required reforestation, mitigation or offset areas must be designated under a development agreement or other instrument and recorded among the land records.
- e. The county may establish regional areas for plantings and/or stormwater management facilities to fulfill the water quality and wildlife habitat functions of the critical area buffer for those areas which have been exempted from the buffer exempt area provisions using the fee in lieu paid. Monies contributed under this section shall be deposited in

Case No. 5071 – Old Trail Partnership

a separate account and shall be used for site identification, acquisition, design, preparation and planting of vegetation at selected regional water quality and wildlife improvement areas, and shall not revert to the general fund.

[b] For commercial, industrial, institutional, recreational and multi-family residential areas designated as buffer exempt areas, construction or placement of new structures and associated new impervious surfaces on developed parcels is permitted provided that:

- (i) The applicant can demonstrate that there is no feasible alternative for the location of the new developed or redeveloped activity, including structures, roads, parking areas and other impervious surfaces or septic systems.
- (ii) The applicant can demonstrate that efforts have been made to minimize buffer impacts by locating activities as far as possible from mean high tide, the landward edge of tidal wetlands or the edge of tributary streams, and variances to other local setback requirements have been considered before additional intrusion into the buffer. Convenience or expense shall not be factors considered when evaluating the extent of allowable impacts to the buffer.
- (iii) New development, including accessory structures, shall minimize the extent of intrusion into the buffer. New development shall not be located closer to the water (or edge of tidal wetlands) than the zoning district setback or 50

Case No. 5071 – Old Trail Partnership

feet, whichever is greater. Structures on adjacent properties shall not be used to determine the setback line. The 50-foot setback shall be maintained for all subsequent development or redevelopment of the property.

- (iv) Redevelopment, including accessory structures, shall minimize the extent of intrusion into the buffer. Redevelopment shall not be located closer to the water (or edge of tidal wetlands) than the zoning district setback or 25 feet, whichever is greater. Structures on adjacent properties shall not be used to determine the setback line. Existing structures located within the setback may remain or a new structure may be constructed on the footprint of an existing structure or impervious surface. Opportunities to establish a 25-foot setback should be maximized.
- (v) Development and redevelopment may not impact any habitat protection areas other than the buffer, including nontidal wetlands, other state or federal permits notwithstanding.
- (vi) No natural vegetation may be removed in the buffer except that required by the proposed construction. The applicant will be required to maintain any other existing natural

Case No. 5071 – Old Trail Partnership

vegetation in the buffer.

- (vii) Buffer exempt area designation shall not be used to facilitate the filling of tidal wetlands that are contiguous to the buffer or to create additional buildable land for new development or redevelopment.
- (viii) Any development or redevelopment in the buffer exempt area requires mitigation in the form of plantings, offsets or fees in lieu.
 - a. A forested or landscaped bufferyard, 25 feet wide, shall be established on the project site between the development and the water. This bufferyard shall be densely planted with trees and shrubs.
 - b. On redevelopment sites, if existing structures or those rebuilt on an existing footprint limit the area available for planting, then appropriate modifications to the width of the planted bufferyard may be made on a case-by-case basis as approved by the Zoning Administrator.
 - c. In addition to the 25-foot bufferyard, natural forest vegetation of an area twice the extent of the footprint of the development activity

Case No. 5071 – Old Trail Partnership

shall be planted within the 100-foot buffer on-site, or at another location, preferably on-site.

d. Applicants who cannot comply with the planting requirements in Subsection c above may use offsets to meet mitigation requirements, such as removal of an equivalent area of existing impervious surfaces in the buffer, the construction of best management practices for stormwater, wetland creation or restoration or other measures approved by the Zoning Administrator that improve water quality or habitat. If it is not possible to carry out offsets or other mitigation within the critical area, any planting or other habitat/water quality improvements should occur within the affected watershed.

e. Applicants who cannot comply with either the planting or offset requirements shall pay a fee in lieu of \$1.20 per square foot for the area to be planted.

f. Any required reforestation/mitigation offset areas must be designated under a development agreement

Case No. 5071 – Old Trail Partnership

or other instrument and recorded among the land records.

- g. The county may establish regional areas for plantings and/or stormwater management facilities to fulfill the water quality and wildlife habitat functions of the critical area buffer for those areas which have been exempted from the buffer exempt area planting provisions and use the fee in lieu alternative. Monies contributed under this section shall be deposited in a separate account and shall be used for site identification, acquisition, design, preparation and planting of vegetation at selected regional water quality and wildlife improvement areas, and shall not revert to the general fund.

Section 267-41.1G(3)(a)

G. Habitat protection areas.

(3) General provisions.

- (a) Development activities or other land disturbances, including commercial tree harvesting and agricultural activities, are prohibited within the boundaries of an identified habitat protection area unless the Zoning Administrator certifies that the location of the activities and/or the limitations and restrictions placed on them will avoid adverse impacts on the water quality protection and plant and wildlife habitat values of the area or to the species dependent upon such areas.

Section 267-41G(4)(b)(1) and (2)

Case No. 5071 – Old Trail Partnership

G. Habitat protection areas.

- (4) Specific provisions. Activities affecting particular habitat protection areas shall comply with the following requirements:
 - (b) Non-tidal wetlands.
 - [1] Development activities shall not be permitted in non-tidal wetlands, except for permitted development associated with water-dependent facilities as listed in Subsection F(7) of this section.
 - [2] A seventy-five-foot Buffer shall be established adjacent to non-tidal wetlands.

Section 267-41.1G(4)(e)

G. Habitat protection areas.

- (4) Specific provisions. Activities affecting particular habitat protection areas shall comply with the following requirements:
 - (e) Riparian forests and other forested areas utilized as breeding habitat by forest interior dwelling species. The following management practices shall be followed in the case of development, forest operations or other activities in areas identified as breeding habitat for forest-interior-dwelling species in accordance with the procedures specified in the technical report, A Guide to the Conservation of Forest Interior Dwelling Birds in the Critical Area. (Appendix N of the Harford County Chesapeake Bay Critical Area Management Program):
 - [1] Minimize disturbance during the May-August breeding season.
 - [2] Locate development or other activities that would cause disturbance to the forested areas such as roads, utility line corridors, structures and intensive timber harvesting on the periphery of the site.
 - [3] To the maximum extent feasible, retain the forest canopy and trees and shrubs underneath the canopy. A timber harvest within forest interior dwelling species habitat shall not open the canopy by more than 30%.

Case No. 5071 – Old Trail Partnership

- [4] Timber harvesting shall be undertaken utilizing techniques, which help to maintain or improve habitat for forest interior dwelling species. The State of Maryland Forest Service shall be consulted for advice on the use of proper techniques prior to any timber harvesting operations.

Section 267-41.1 (M)

M. Expansion of intensely developed and limited development management areas.

(1) General requirements. The boundaries of the intensely developed and limited development management area, as shown on each Zoning Map overlay, may be expanded in accordance with the following procedures for use of a portion of the county's growth allocation:

- (a) Acreage. The total area of expansion shall not exceed an area equal to 5% of that portion of the total land in the county's resource conservation management area that is not designated tidal wetlands. No more than one-half of the allocated expansion shall occur in areas shown in the resource conservation management area.
- (b) Location. Expansion of the intensely developed or limited development management areas may be approved subject to the following locational criteria:
 - [1] Such areas shall be located adjacent to an existing limited development area or intensely developed management area. New intensely developed areas must be a minimum of 20 acres in size unless they are adjacent to an existing IDA or LDA or are an existing grandfathered commercial, industrial or institutional use that existed as of the date of the original local program approval.
 - [2] Such areas shall be located at least 300 feet from tidal waters or tidal wetlands if the land was originally designated in the original resource conservation management area, unless the Zoning Administrator certifies that a critical area buffer less than 300 feet in width is adequate to protect water quality and fish, plant and wildlife habitat.
 - [3] Such areas shall incorporate measures to protect water quality and identified habitat protection areas located on or adjacent to the proposed expansion areas.

Case No. 5071 – Old Trail Partnership

- [4] Such areas shall minimize impacts to habitat protection areas and lands in resource conservation management areas in proximity to such an expanded limited development or intensely developed areas.
- (2) Additional requirements. All projects granted a growth allocation shall conform to the following additional standards:
 - (a) All forested area removed shall be replaced on a square-footage basis in accordance with the procedures specified in Section 267-41.1F of the Zoning Code and the Forest Management Guide. If such replacement is not feasible, an in-lieu fee must be paid to the county in accordance with the procedures specified in this section.
 - (b) Pollutant loadings associated with developments granted growth allocations shall be managed according to the levels required for the land use management area amendment. In the case of new intensely developed areas, such loadings shall be reduced 10% from pre-development levels. The procedures contained in the technical report entitled "Applicant's Guide for 10% Rule Compliance - Urban Stormwater Quality Guidance for the Maryland Chesapeake Bay Critical Area in Intensely Developed Areas (IDA)" (Appendix C of the Harford County Critical Area Management Program, as amended) shall be used to determine the amount of reduction required and what specific measures are needed to meet these requirements.
 - (c) Development on slopes greater than 15% as measured prior to development shall be prohibited.
 - (d) Development on soils with development constraints; i.e., highly erodible soils, soils with severe septic constraints, hydric soils less than 40,000 square feet in extent, and soils with hydric inclusions as listed in Table XVI shall be restricted. The Zoning Administrator may permit development on such soils if adequate mitigation measures are applied to address the identified constraints and to avoid significant adverse impacts on water quality or fish, plant or wildlife habitats.
- (3) Standards for review of expansion projects.
 - (a) Project review criteria. In addition to the requirements listed in Subsections M(1) and (2) above, all projects requesting an expansion of the IDA and LDA as a growth allocation shall be reviewed and evaluated for their conformance with the following factors:
 - [1] The amount of forested area and other vegetative cover that is left undisturbed and in a natural state on the site.

Case No. 5071 – Old Trail Partnership

- [2] Additional public improvements and the specific nature of such improvements that will be provided with the proposed development. (Examples of these would include public access facilities to waterfront areas, acceleration of the provision of public water and sewer service to areas with existing health problems, dedication of lands for public park purposes, etc.)
- [3] Use of innovative site design and construction design features to minimize the disturbance of natural areas and reduce potential impacts on habitat protection areas and adjacent communities and RCA areas. These features could include, but are not limited to:
 - [a] The use of cluster development;
 - [b] The use of shallow-marsh creation stormwater management measures;
 - [c] The use of buffer areas to minimize impacts on existing habitats and wildlife corridors and protect adjacent natural and developed areas from impacts of the proposed development;
 - [d] The use of appropriate landscaping plans and materials to enhance the establishment of vegetated buffer areas on the project site.
- (b) Annexation areas. Any area proposed for annexation by a municipality where the proposed use on the parcel requires a change in the land use management area (i.e., RCA to LDA or IDA, etc.) shall be subject to all the procedures for growth allocation as specified in this section.

Section 267-41.1H(8)

- H. Variances. Variances from the provisions of this section may only be granted if, due to special features of a site or other circumstances, implementation of this section or a literal enforcement of its provisions would result in unwarranted hardship to an applicant. All applications for variances shall be reviewed by the Zoning Administrator for conformance with applicable provisions of this section, and a written report shall be provided to the Board of Appeals. In granting a variance, the Board shall issue written findings demonstrating that the requested approval complies with each of the following conditions:

Case No. 5071 – Old Trail Partnership

- (1) That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.
- (2) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.
- (3) That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.
- (4) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.
- (5) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.
- (6) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.
- (7) That the growth allocation for the county will not be exceeded by the granting of the variance.
- (8) That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

Section 267-9I

- I. Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:
 - (1) The number of persons living or working in the immediate area.

Case No. 5071 – Old Trail Partnership

- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.
- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.
- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.
- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the county or persons to supply such services.
- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.
- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.
- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.
- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.
- (10) The preservation of cultural and historic landmarks.

Natural Resources Article Annotated Code of Maryland Section 8-1808(D)

- (D)(1) A variance to a local jurisdiction's critical area program may not be granted unless:
- (i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant;
 - (ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and
 - (iii) Without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the provisions of the critical area program.
- (2) In considering an application for a variance, a local jurisdiction shall consider the

Case No. 5071 – Old Trail Partnership

reasonable use of the entire parcel or lot for which the variance is requested.

- (3) This subsection does not apply to building permits or activities that comply with a buffer exemption plan or buffer management plan of a local jurisdiction which has been approved by the Commission.

CONSIDERATION OF THE VARIANCES:

It is apparent that based upon a review of the entire record the Old Trails Property cannot be developed without the granting of at least some variances. The parcel is almost totally encumbered as a result of various buffers and setbacks resulting primarily from the effect of the Chesapeake Bay Critical Area Legislation as enacted in the Harford County Zoning Code. It is also clear that the consensus of the experts for both the Applicant and the Chesapeake Bay Critical Area Commission is that this parcel has, at various locations, floodplain, steep slopes, highly erodible soil, tidal wetlands, nontidal wetlands, and habitats of local significance. The existence of these various features encumber the ability to develop this property. Moreover, the Board of Appeals finds that it is clear that some portions of the property are subject to more than one type of topographical feature restrictions or encumbrances. For instance, some portions of the property have both steep slopes and highly erodible soil, where as other areas may only be subject to either a steep slope or highly erodible soil but not both features.

The Board of Appeals is well aware of the competing legal concepts which constitute the broad legal framework which must be considered. Harford County, when it initially enacted the Chesapeake Bay Critical Area overlay district legislation, acknowledged the importance of protecting the resources of the Chesapeake Bay. Section 267-41.1.A On the other hand, is the concept that property owners are guaranteed rights under both the Maryland Declaration of Rights and the Fifth Amendment to the United States Constitution. As the Court of Appeals noted

“...we must not forget the underlying principle that, ‘Such ordinances (zoning ordinances) are in derogation of the common law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language.’” Aspen Hill Adventure v. Montgomery County Council, 265 Md. 303, 313-14 (1972).

It is also important to note that the Board of Appeals is further guided by Section 267-11B which provides that “(n)o variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1.” All the requests of Applicant are for relief from literal enforcement of Part 1 of the Zoning Code.

Case No. 5071 – Old Trail Partnership

The Board is mindful that portions of the property are zoned either R3 or B3 and have a Critical Area designation of Intensively Developed Area (IDA). The Board notes that neither the zoning status nor the Critical Area designation constitutes an entitlement to develop without compliance of all applicable zoning rules and regulations.

It is against this backdrop that we analyze the requested variances using the ‘magnifying glass’ of the applicable law previously identified.

The issue is whether the requested variances can be approved, in whole or in part, pursuant to the provisions of the Harford County Code. Section 267-41.1(H) as previously noted, authorizes the granting of variances from provisions of the Chesapeake Bay Critical Area if, due to special features of the site or other circumstances, implementation of this section or literal enforcement of its provisions would result in unwarranted hardship to an Applicant. In granting a variance, the Board of Appeals is required to issue written findings demonstrating that the requested approval complies with nine numerated criteria mandated by Section 267-41.1(H).

The Variance request from the 200 foot setback for sewage pumping stations from adjacent residential lot.

Applicant has requested a variance pursuant to Section 267(11) from the requirement of Section 267-36B, Table VI establishing a minimum 200 foot setback for sewage pumping stations from adjacent residential lot. Specifically, the Applicant has requested a variance for permission to build a pumping station 75 feet from the closest adjacent residential lot for a total variance request of 125 feet from the zoning code requirements. The Applicants request for this variance is hereby **DENIED**.

Analysis

Analyzing this request in light of Section 267-41.1(H) we find as follows regarding the nine enumerated criteria.

- (1) *That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.***

This variance request is not for permission to build a pumping station within either the buffer or expanded buffer of the Chesapeake Bay Critical Area. Rather, this request is for an area variance from the setback requirements. A thorough review of the entire record in this case reveals Applicant did not establish that any special conditions and circumstances exist peculiar to the land which would require the building to be situated closer than 200 foot from an adjacent residential parcel. It is clear that Applicant's proposed development on the property is not dependent upon this pumping station being situated closer to the lots. On the contrary, Applicant's justification for this request was to allow him to develop the property as designed in 1986 rather than redesign the configuration. Applicant's basic premise is that they desire to keep the proposed 56 lot configuration. Applicant's request, in essence, is a request to have a residential parcel located closer than 200' from the pumping station.

Case No. 5071 – Old Trail Partnership

Applicant has failed to produce sufficient evidence which persuades the Board of Appeals that this is necessary due to special conditions or circumstances which exist on the subject parcel.

- (2) *That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.***

Again, a thorough review of the entire record reveals that the Applicant has not satisfied his burden in this regard and the construction of the pumping station in accordance with the 200 foot setback will not deprive them of any rights enjoyed by properties in similar geographic and land use management areas within the critical area.

- (3) *That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.***

A thorough review of the entire record reflects that the Applicant did not produce evidence sufficient to satisfy both his burden of production and burden of persuasion and, moreover, the record is void of any reference to other lands within the critical area where this specific variance has been granted.

- (4) *That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.***

A thorough review of the entire record reflects that the Applicant has met his burden of satisfying this criteria. As the Court of Appeals noted in Richard Roescher Professional Builder, Inc. v. Anne Arundel County, Maryland, 368 Md. 294 (2002), the type of hardships that are generally considered to be created by the actions of an applicant arise from the actions of the landowner rather than the hardship impact, if any, of the zoning ordinance on the property. In this case, the record reflects that the Applicant has not taken any action which created conditions or circumstances which would be the impetus for the requested variance.

- (5) *That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.***

A thorough review of the entire record reflects that the Applicant did not specifically address this issue in connection with this requested set back variance. Notwithstanding, the Board of Appeals finds that upon the totality of the evidence presented that there is no evidence that situating the pumping station closer than 200 feet to an adjacent residential lot will have any effect upon water quality or adversely impact fish, wildlife, or plant habitat any greater than the impact which would be caused by locating the structure in compliance with the zoning code requirements. Therefore, this criteria is satisfied.

Case No. 5071 – Old Trail Partnership

(6) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.

A thorough review of the record reflects that the Applicant proposes to reduce or eliminate any existing erosion and uncontrolled runoff from the property which, in turn, will improve the quality of water. Moreover, Applicant has indicated that it can meet or exceed the 10% rule concerning pollutant loadings which will also result in improving the water quality and, in turn, the aquatic habitat. Although Applicant identified Forest Interior Dwelling Bird Habitat as being situated on the subject parcel, it is also clear that this information was derived primarily from GIS maps. The Board of Appeals concurs with the observations of Claudia Jones who walked the subject property three times and specifically made an evaluation of the forest interior bird habitat and found that the site did not qualify as same. Moreover, she confirmed this finding with a regional ecologist. Additionally, the Department of Planning and Zoning also found that the property was not a forest interior dwelling bird habitat. Nevertheless, the location, vel non of the pumping station closer than 200 feet to an adjacent residential lot by itself is a neutral factor. It is the actual construction of the structure within the critical area buffer or expanded buffer would be the cause of potential impact, if any. Therefore, this criteria is satisfied.

(7) That the growth allocation for the county will not be exceeded by the granting of the variance.

A thorough review of the entire record reflects that the Applicant satisfied this provision and growth allocation for Harford County will not be exceeded by the granting of this variance. Development of the subject parcel will not require Harford County to use any of its current growth allocation available to it.

(8) That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

A thorough review of the entire record reflects that the Applicant has not satisfied its burden of both production and persuasion concerning this criteria. It is further clear that should a pumping station have a mechanical malfunction which would result in an overflow or a spill that same would be substantially more detrimental to a residential parcel located within 75 feet than to a more remotely located parcel of at least 200 feet.

(9) All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.

Case No. 5071 – Old Trail Partnership

A thorough review of the entire record reflects that the provisions related to original filings are in compliance with the provisions of this section. Moreover, a copy of the Zoning Hearing Examiner's recommended decision was promptly sent to the Critical Area Commission. Finally, it is the Board of Appeals intention to promptly forward of copy of this decision to the Critical Area Commission in order to comply with this provision.

The Variances requested to construct structures and/or infrastructure within the critical area buffer and the expanded critical area buffer.

Applicant has also requested a myriad of variances from the prohibition to build within the 100 foot buffer of the Chesapeake Bay Critical Area or the prohibition to build within the expanded Chesapeake Bay Critical Area buffer. The specifics of these requested variances have been identified earlier in this Decision and need not be restated again. The Applicant's requested variances as proposed are hereby **DENIED**.

Analysis

Again, the Board of Appeals must analyze the totality of the remaining variances requested by the Applicant with reference to the nine enumerated criteria contained in Section 267-41.1(H).

- (1) *That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.***

A thorough review of the entire record reveals that the burden in establishing that variances of some type are necessary is satisfied. It is apparent that this property is subject to special conditions or circumstances which are peculiar to this parcel. It is also apparent that this 31-acre parcel is situated almost entirely within the buffer and expanded buffer of the county's Critical Area. It is also obvious from review of the record that the Applicant can not develop this property without obtaining some variances from the provisions of the Code. Accordingly, no reasonable use can be made of the property without the granting of *some* variances to the provisions of the critical area restrictions. However, our review of the record finds that the plethora of variances requested are beyond that which is necessary to avoid an unwarranted hardship and therefore, the Applicant has not satisfied this criteria.

Case No. 5071 – Old Trail Partnership

- (2) That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.***

A blanket denial of all requested variances would deprive the Applicant of rights commonly enjoyed by other properties within the critical area since an absolute denial of all the requested variances would operate as a denial of reasonable and significant use of the property by the Applicant. In fact, total rejection of any variance request could potentially be considered as the functional equivalent of the taking of the property in the constitutional sense. The Board of Appeals finds that all property owners within the critical area are entitled to reasonable and significant use of their property. What all property owners are not entitled to is unfettered and excessive use of their property. The Board of Appeals finds that the requested variances in their entirety are excessive and are not necessary to allow the Applicant reasonable and significant use of their property.

While the Board of Appeals acknowledges that most of the parcel is subject to topographical feature restrictions of some type, some pieces of the parcel are subject to more topographical feature restrictions than other pieces of the land. Applicant's development proposal does not take this factor into consideration and proposes to develop more environmentally sensitive pieces of the parcel in conjunction with less environmentally pieces of the parcel. Accordingly, based upon a thorough review of the entire record, the Applicant has not satisfied this criteria.

- (3) That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.***

A thorough review of the entire record reflects that the granting of some type of variances will not confer upon the Applicant any special privilege that would be denied to other lands or structures within the critical area since all property owners would be entitled to reasonable and significant use of their property and any other property which would be subject to almost total encumbrance by both the buffer and expanded buffer of the critical area would require variances of some type. Nevertheless, no other property sought to be developed within the critical area would be entitled to the overly intensive use of property taking into consideration the environmentally sensitive topographical features contained thereupon. A property owner is entitled to reasonable and significant use of their property and not necessarily a use which could be characterized in the Applicant's opinion as the best and highest use. Accordingly, Applicant has not satisfied its burden of production and persuasion regarding this criteria.

Case No. 5071 – Old Trail Partnership

(4) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.

A thorough review of the entire record reflects that the Applicant has met his burden of satisfying this criteria. Variance requests which are based upon conditions or circumstances which are the result of actions by the Applicant are not those which are solely based upon the hardship impact of the zoning ordinance on the property. It is primarily the impact from the buffer and expanded buffer of the critical area which has initiated this request for variances. The record does not reflect that Applicant has performed any action which created conditions or circumstances which were the reason for requesting variances.

(5) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.

A review of the record reflects that the Applicant proposes to reduce or eliminate any existing erosion and uncontrolled runoff from the property which, in turn, will improve the quality of water. Moreover, Applicant has indicated that it can meet or exceed the 10% rule concerning pollutant loadings which will also result in improving the water quality and, in turn, the aquatic habitat. Although Applicant identified Forest Interior Dwelling Bird Habitat as being situated on the subject parcel, it is also clear that this information was derived primarily from GIS maps. The Board of Appeals concurs with the observations of Claudia Jones who walked the subject property three times and specifically made an evaluation of the forest interior bird habitat and found that the site did not qualify as same. Moreover, she confirmed this finding with a regional ecologist. The Department of Planning and Zoning is in agreement with this evaluation. The Department of Planning and Zoning also believed that the property was not a forest interior dwelling bird habitat. Good storm water management practices are planned by the Applicant. Applicant further proposes to utilize phased clearing and construction to minimize disturbed areas and daily stabilization measures to minimize the potential for sediment pollution resulting from the disturbance of soils. Accordingly, the Applicant satisfied this criteria.

(6) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.

As identified above, Applicant's evidence shows that water quality will be improved as the result of various measures planned as part of the development of the site. Improved aquatic habitat will be the result of better water quality. As discussed earlier, the Board of Appeals concurs that the subject property does not contain forest interior bird habitat. Nevertheless, the record as a whole reflects that the Applicant's proposed development plan proposes significant intrusion into habitat protection areas as defined in the zoning code, especially in those areas where a piece of property is subject to more than one topographical feature of areas of significant natural value. Accordingly, Applicant has not satisfied this criteria that habitat protection areas are protected by the proposed development.

(7) That the growth allocation for the county will not be exceeded by the granting of the

Case No. 5071 – Old Trail Partnership

variance.

A thorough review of the entire record reflects that the Applicant satisfied this provision and growth allocation for Harford County will not be exceeded by the granting of this variance. Development of the subject parcel will not require Harford County to use any of its current growth allocation available to it.

(8) That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

A thorough review of the entire record reflects that the Applicant has not satisfied its burden of both production persuasion concerning this criteria. The Applicant has requested a panoply of variances which, in turn, will result in the over-utilization of this admittedly fragile parcel of property. The public interest is best served by a healthy and vibrant Chesapeake Bay. The protection of both the Chesapeake Bay and its tributaries from adverse impacts from development is obviously the centerpiece of this protection. The public interest will not be served by the granting of all the requested variances which result in the excessive over-utilization of the property in light of it being situated in the critical area.

(9) All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.

A thorough review of the entire record reflects that the provisions related to original filings are in compliance with the provisions of this section. Moreover, a copy of the Zoning Hearing Examiner's recommended decision was promptly sent to the Critical Area Commission. Finally, it is the Board of Appeals intention to promptly forward of copy of this decision to the Critical Area Commission in order to comply with this provision.

RELIEF GRANTED TO APPLICANT

Analysis

Case No. 5071 – Old Trail Partnership

The Board of Appeals is not unmindful that the Zoning Hearing Examiner recommended the granting of the totality of the requested variances to Applicant which would have allowed them to construct the development as proposed. However, for the reasons stated above, the Board of Appeals find that Applicant's request for the total approval of all requested variances is not supported by the evidence. However, since the record has established that no development can occur unless at least some variance from the provisions of the zoning code is granted, our analysis is not yet complete.

As previously noted, the Board of Appeals is statutorily directed not to grant a variance which exceeds the minimum adjustment necessary to relieve the hardship imposed by the literal enforcement of the zoning code. The hardship which Applicant is seeking to relieve through the granting of variances is an *unwarranted hardship* which would arise from the literal enforcement of the critical area program. As the Court of Appeals decided in Belvoir Farms Homeowners Association, Inc. v. John C. North, Chairman, Chesapeake Bay Critical Area Commission, 355 Md. 259 (1999), the unwarranted hardship standard is equivalent to the denial of reasonable and significant use of the property.

The Board of Appeals, after a thorough review of the entire record, has determined that some of the Applicant's requested variances can be granted in part and allow them reasonable and significant use of the property. Further, the Board of Appeals finds that the partial granting of some of Applicant's requested variances does not exceed the minimum adjustment necessary to relieve Applicant from the hardship imposed by the literal enforcement of the zoning code. Finally, as described below, a review of the record finds that the Applicant did establish both his burden of production and burden of persuasion for the partial granting of the following variances and that the granting of them satisfies the criteria established by Section 267-41.1(H). Moreover, in the granting of the following variances the Board of Appeals has considered the application by considering the reasonable use of the entire parcel or lot for which the variance is requested pursuant to the requirements of Natural Resources Article Section 8-1808(D).

The variances granted and the areas of the property to which they apply shall be identified by reference to Applicant's Exhibit 7A – 7 E.

1. Applicant's requested variance to build on those areas identified as having hydric soils and/or highly erodible soils shall be granted as long as the area identified as having either hydric soils and/or highly erodible soils does not also have a feature which constitutes either a steep slope or wetland. Those areas which contain either hydric soils and/or highly erodible soils and also contain one or more of the other features in either Section 267-41.1G(2)(a) and Section 267-41.1G(2)(b) shall not be granted a variance from the provisions of the critical area except as identified below.

2. The Applicant shall further receive a variance to build those portions of road identified on Applicant's Exhibit 7A – 7E which are necessary for ingress and egress to those areas of the property identified in paragraph 1 immediately above. The building of this access roadway shall be permitted on either a portion of the property identified as having a steep slope or, alternatively, a piece of the property identified as part of a wetland buffer but a variance for this access roadway is not granted for a piece of property which is identified on Applicant's Exhibit 7A – 7E as containing the characteristics of both steep slopes and located within the 75 foot wetlands buffer. The variance to construct the access roads is only for that amount which shall be minimally necessary

Case No. 5071 – Old Trail Partnership

to avoid land-locking any lot or parcel identified above. Moreover, the variance to build this access road shall not include any parking areas for either “on road” or “off road” parking.

3. No variance is granted from the requirements of the critical area buffer of 100 feet in width as required by Section 267-41.1G(2)(a).

Case No. 5071 – Old Trail Partnership

Analyzing the variances granted with reference to Section 267.41.1(H) we find as follows:

- (1) ***That special conditions or circumstances exist that are peculiar to the land or structure within the County's critical area, and a literal enforcement of the critical area program would result in an unwarranted hardship.***

A thorough review of the entire record reveals that the burden in establishing this criteria is satisfied. It is apparent that this property is subject to special conditions or circumstances which are peculiar to this parcel. It is apparent that this 31-acre parcel is situated almost entirely within the buffer and expanded buffer of the county's critical area. It is also obvious from review of the record that the Applicant can not develop this property without obtaining some variances from the provisions of the Code. Accordingly, no reasonable use can be made of the property without the granting *some* variance to the provisions of the critical area restrictions. The variances granted will allow the Applicant reasonable and significant use of the property.

- (2) ***That a literal interpretation of the provisions of this section will deprive the applicant of rights commonly enjoyed by other properties in similar geographic and land use management areas within the critical area.***

As discussed earlier in this Decision, a complete denial of any variance to the requirements of the Critical Area Program would deprive the Applicant of rights commonly enjoyed by other properties within the critical area. An absolute denial of any variances would operate as a denial of reasonable and significant use of the property by the Applicant. The total denial of any variance could potentially be considered as the functional equivalent of the taking of the property in the constitutional sense. The Board of Appeals finds that all property owners within the critical area are entitled to reasonable and significant use of their property. The variances granted to the Applicant in this case will allow them reasonable and significant use of the property in question. Accordingly, the Applicant has satisfied this criteria.

- (3) ***That the granting of a variance will not confer upon the applicant any special privilege that would be denied by this section to other lands or structures within the critical area.***

A thorough review of the entire record reflects that the granting of a variance will not confer upon the Applicant any special privilege that would be denied to other lands or structures within the critical area since all property owners would be entitled to reasonable and significant use of their property and any other property which would be subject to almost total encumbrance by both the buffer and expanded buffer of the critical area would require variances of some type. Moreover, other lands located in the critical area would be entitled to development of some type. Accordingly, the Applicant has satisfied this criteria.

Case No. 5071 – Old Trail Partnership

(4) That the variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.

As previously noted in this Decision, a thorough review of the entire record reflects that the Applicant has met his burden of satisfying this criteria. Variance requests which are based upon conditions or circumstances which are the result of actions by the Applicant are not those which are solely based upon the hardship impact of the zoning ordinance on the property. It is primarily the impact from the buffer and expanded buffer of the critical area which has initiated the request for variances. The record does not reflect that Applicant has performed any action which created conditions or circumstances which were the reason for requesting variances.

(5) That the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the critical area, and the granting of the variance will be in harmony with the purpose and intent of this section.

A thorough review of the record reflects that the Applicant proposes to reduce or eliminate any existing erosion and uncontrolled runoff from the property which, in turn, will improve the quality of water. Moreover, Applicant has indicated that it can meet or exceed the 10% rule concerning pollutant loadings which will also result in improving the water quality and, in turn, the aquatic habitat. Although Applicant identified Forest Interior Dwelling Bird Habitat as being situated on the subject parcel, it is also clear that this information was derived primarily from GIS maps. The Board of Appeals concurs with the observations of Claudia Jones who walked the subject property three times and specifically made an evaluation of the forest interior bird habitat and found that the site did not qualify as same. Moreover, she confirmed this finding with a regional ecologist. Additionally, the Department of Planning and Zoning also believed that the property was not a forest interior dwelling bird habitat. Good storm water management practices are planned by the Applicant. Applicant further proposes to utilize phased clearing and construction to minimize disturbed areas and daily stabilization measures to minimize the potential for sediment pollution resulting from the disturbance of soils. Accordingly, the Applicant has satisfied this criteria and the variances granted are appropriate.

(6) That all identified habitat protection areas on or adjacent to the site have been protected by the proposed development and implementation of either on-site or off-site programs.

As identified above, Applicant's evidence shows that water quality will be improved as the result of various measures planned as part of the development of the site. Improved aquatic habitat will be the result of the better water quality. As discussed earlier, the Board of Appeals concurs that the subject property does not contain forest interior bird habitat. The granting of the variances as described above will provide minimal disruption to those areas which have been identified as being subject to more topographical feature restrictions than other pieces of the land. This, in turn, will result in the protection of all habitat protection areas. Therefore, the variance granted to the Applicant satisfies this condition. The granting of the variances as described above will provide minimal disruption to those areas which have been identified as being subject to more topographical feature restrictions than other pieces of the land. This, in turn, will result in the protection of all identified habitat protection areas. Therefore, the variance granted to the Applicant satisfies this condition.

Case No. 5071 – Old Trail Partnership

(7) That the growth allocation for the county will not be exceeded by the granting of the variance.

A thorough review of the entire record reflects that the Applicant satisfied this provision and growth allocation for Harford County will not be exceeded by the granting of this variance. Development of the subject parcel will not require Harford County to use any of its current growth allocation available to it.

(8) That the variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.

A thorough review of the entire record reflects that the variances granted to the Applicant satisfy this criteria. These variances minimize any potential adverse impacts from the development to the Chesapeake Bay and its tributaries. The pieces of this parcel which will be developed are certainly compatible in size and scope with adjacent properties.

(9) All applications for variance requests shall be filed in writing in accordance with Section 267-9D of the Zoning Code. Notice of all variance requests and copies of applications filed in accordance with this section shall be sent to the Chesapeake Bay Critical Area Commission within 10 working days of filing with the Department of Planning and Zoning. A copy of the recommendation of the hearing examiner or of the Board in acting on the variance shall be promptly sent to the Commission.

A thorough review of the entire record reflects that the provisions related to original filings are in compliance with the provisions of this section. Moreover, a copy of the Zoning Hearing Examiner's recommended decision was promptly sent to the Critical Area Commission. Finally, it is the Board of Appeals intention to promptly forward of copy of this decision to the Critical Area Commission in order to comply with this provision.

Finally, pursuant to Section 267-9I, the Board finds that the variances granted will not adversely affect the public health, safety and general welfare or result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood.

Applicability of Section 267-41.1(M) to the subject parcel

In essence, Section 267-41.1(M) provides that, for the purposes of this Decision, if there is a request for the expansion of an Intensely Developed Area (IDA) designation that additional requirements shall be satisfied. Moreover, any such expansion shall require the use of the county's remaining growth allocation. The subject property received the designation of IDA at the inception of Harford County's critical area legislation. The Applicant's request for variances from the requirements and restrictions imposed by this critical area law do not request an expansion, amendment, or reclassification of the property. A thorough review of the entire record convinces the Board of Appeals that this property is not subject to the requirements of this section.

Case No. 5071 – Old Trail Partnership

FINAL RESULT

In summary, as previously discussed, the total approval of the Applicant's requested variances en masse is denied but the Applicant is granted the following variances subject to the conditions listed.

All listed conditions are either suggested by Applicant or identified in the record and the Board, upon a complete review thereof, find same to be both necessary and appropriate in consideration of all applicable law, including, but not limited to, Section 267-9I.

1. Applicant's requested variance to build on those areas identified as having hydric soils and/or highly erodible soils shall be granted as long as the area identified as having either hydric soils and/or highly erodible soils does not also have a feature which constitutes either a steep slope or wetland. Those areas which, in addition to either hydric soils and/or highly erodible soils, contain any other feature as identified in Section 267-41.1G(2)(a) and Section 267-41.1G(2)(b) shall not be granted a variance from the provisions of the critical area except as identified below.
2. The Applicant shall further receive a variance to build those portions of road identified on Applicant's Exhibit 7A – 7E which are necessary for ingress and egress to those areas of the property identified in paragraph 1 immediately above. The building of this access roadway shall be permitted on either a portion of the property identified as having a steep slope or, alternatively, a piece of the property identified as part of a wetland buffer but a variance for this access roadway is not granted for a piece of property which is identified on Applicant's Exhibit 7A – 7E as containing the characteristics of both steep slopes and located within the 75 foot wetlands buffer. The variance to construct the access roads is only for that amount which shall be minimally necessary to avoid land-locking any lot or parcel identified above. Moreover, the variance to build this access road shall not include any parking areas for either "on road" or "off road" parking.
3. No variance is granted from the requirements of the critical area buffer of 100 feet in width as required by Section 267-41.1G(2)(a).
4. No variance is granted for the locating of a pumping station closer than 200 feet from an adjacent residential lot.

The approval of the above variances are subject to the following conditions:

1. The Applicant shall submit a final site plan to the Department of Planning and Zoning for a review and approval.
2. The Applicant shall use phased construction to minimize disturbances and control erosion.
3. A phased construction plan shall be submitted for review and approval to the Department of Planning and Zoning.

Case No. 5071 – Old Trail Partnership

4. The Plan shall minimize to the maximum extent possible, the removal and/or disturbance of existing foliage and forest cover.
5. Stormwater management quality control measures will be designed to remove pollutants per the best management practices as recommended in the Applicant's Guide for 10% Rule Compliance - Urban Stormwater Quality Guidance for the Maryland Chesapeake Bay Critical Area in IDA and the Technical Guide for 10% Rule Compliance - Urban Stormwater Quality Guidance for the Chesapeake Bay Critical Area in Intensely Developed Area (ID's). A minimum of 4.0 pounds of pollutant must be removed in accordance with the Applicant's proposal final stormwater management plan shall incorporate measures to reduce uncontrolled runoff presently existing on the property and to improve the water quality of waters returning to Foster Branch from this and other parcels. A Stormwater Management Plan shall be submitted to the Department of Planning and Zoning for review and approval.
6. All standard sediment control measures should be implemented as called for in the Sediment Control Plan as required by the Harford County Department of Public Works and Natural Resources Conservation Service. The Plan must utilize phased clearing and construction to minimize disturbed areas and daily stabilization measures to minimize the potential for sediment pollution resulting from disturbance of soils, particularly highly erodible soils prevalent on the property.
7. The recommendations of the habitats of Local Significance 1966 Update for the Gunpowder Shore (HLS Site #12 (T&E)) will be adhered to throughout the development process. The proposed plan of development shall make adequate provision for restricting shoreline disturbances, stabilizing gullies and other areas of erosion and removal of common weeds and other invasive and undesirable vegetation.
8. The open space remaining on the property shall be subject to protective covenants that will serve to reserve and protect those areas in their natural state in perpetuity. The covenants restricting those areas shall be submitted to the Department of Planning and Zoning for review and approval and once finalized, shall be filed among the Land Records of Harford County as a permanent covenant running with the land.

Case No. 5071 – Old Trail Partnership

9. Field studies delineating non-tidal and tidal wetlands, habitats of rare or endangered species, steep slopes and other sensitive environmental features shall be prepared and submitted prior to beginning any development of this site.
10. That the Applicant submit a final plat for review and approval by the Development Advisory Committee (DAC).
11. That the Applicant obtain any and all permits and inspections.

COUNTY COUNCIL OF HARFORD COUNTY

January 21, 2003

**Robert S. Wagner
President of the Council**

APPROVED BY THE COUNTY COUNCIL FEBRUARY 4, 2003.

Final decision of the County Council/Board of Appeals may be appealed with the required fees to the Circuit Court for Harford County on or before MARCH 7, 2003. Filing instructions may be obtained from the Clerk of the Circuit Court.